laid down by Mr. Justice Washington, in *Toler* v. *Armstrong*, 4 Wash. 296, is so succinctly announced, that it is best it be given in his own words: "I understand the rule, as now already settled, to be, that where the contract grows *immediately* out of, and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in part only, connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it."

If this demand of twenty-five hundred dollars were allowed, the dividends of the creditors, arising from the assets, would be diminished that amount; and this without any fault on their part, but wholly through the illegal dealings of the bankrupt and others: Bankrupt Law, sec. 22.

I may add, that the law, in allowing a guilty party to take advantage of the illegality of his own act—as is here done by the bankrupt—does so, not with a view of conferring a benefit on him, but upon grounds of public policy, and also in this case, that justice may be done to the creditors of Milner.

The decision of Mr. Register Murray is approved.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF NEW YORK.[2]

Auction Sales.

Agreement not to Bid.—The rules about judicial sales which make void as against public policy, agreements that persons competent to bid at them will not bid, make void such agreements alone as are meant to prevent competition and induce a sacrifice of the property sold. An agreement to bid, the object of it being fair, is not void: *Wicker* v. *Hoppock*, 6 Wall.

Broker. See *Stock*.

Checks.

Not an Assignment of Funds.—Checks drawn in the ordinary general

[1] From J. William Wallace, Esq.; to appear in Vol. 6 of his Reports.

[2] From Hon. O. L. Barbour: to appear in Vol. 49 of his Reports.

form, not describing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of the drawer in the bank upon which they are drawn, but containing only the usual request directed to the bank, to pay to the order of the payee named, a certain sum of money, are of the same legal effect as inland bills of exchange; and do not amount to an assignment of the funds of the drawer in the bank: *Lunt et al.* v. *The Bank of North America*, 49 Barb.

Common Carrier.

Special Damage—Practice.—In a suit against a common carrier for not carrying a party according to contract, the allegation of a breach "whereby the plaintiff was subjected to great inconvenience and injury," is not an allegation of special damage: *Roberts* v. *Graham*, 6 Wall.

An objection of variance between allegation and proof must be taken when the evidence is offered. It cannot be taken advantage of in the appellate court: *Id.*

Limitation of Liability.—Common carriers of goods may by express stipulation limit their liability for the loss of goods occurring from even the negligence of their agents and servants; or wholly exempt themselves from such liability; and the acceptance by the bailor from the bailee, in the ordinary course of business, of a receipt for the goods, containing such a stipulation, creates a binding contract. But the liability of the carrier will continue, as established by the common law, in respect to all matters not expressly stipulated against: *Prentice* v. *Decker*, 49 Barb.

The putting into the hands of a passenger, on receiving her baggage for delivery at her residence, of a card containing a clause limiting the liability of the carrier to a specified amount, except by special agreement to be noted on such card, will not, without further proof from which the assent of such passenger to the terms thereof may be implied, establish such a contract: *Id.*

Such a contract relates only to the carrier's liability as an *insurer* of the goods, and imparts no exemption from liability for actual negligence. And it applies only to deliveries to railroads and steamboats: *Id.*

Who may sue.—The legal title to wearing apparel and jewelry, provided by a father for the use of his infant daughter, remains in him, notwithstanding the possession of them by the infant. And for the purposes of an action by the father, against a common carrier, to recover for the loss of such property, the daughter must be treated as the legally constituted agent of the plaintiff: *Id.*

Constitutional Law. See *Railroad Companies.*

Contract.

To Pay Money—Measure of Damages.—On a breach of a contract to pay, as distinguished from a contract to indemnify, the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken: *Wicker* v. *Hoppock*, 6 Wall.

Criminal Law.

Warrant of Arrest.—It is never necessary to state in a criminal warrant the evidence by which the charge is to be supported. All that is required in that particular, is to "recite the accusation." This requirement is satisfied by a statement which indicates, with reasonable certainty, the crime sought to be charged: *Pratt* v. *Bogardus*, 49 Barb.

Where a warrant, issued by a justice of the peace, after stating time and place, alleged that the defendant "designedly by false pretences, did obtain from" the complainant "one sulky of the value of $30, the property of * * * with intent to cheat and defraud" the complainant. *Held*, that this was a valid warrant upon a complaint for obtaining property by false pretences, although the pretences used were not set out therein: *Id.*

Jurisdiction of Magistrate—His Protection.—Where, in issuing a criminal warrant, a justice of the peace possesses, and is exercising a general jurisdiction of the subject-matter, and not a special jurisdiction over a particular offence created by statute, and thereby restricted as to the manner of proceeding, all that is required to protect him in so doing, is that the evidence produced is colorable—something upon which the judicial mind is called upon to act, in determining the question of probable cause: *Id.*

Where the affidavit upon which an application for a warrant was made, stated, in substance, that the defendant did designedly and by false pretence, obtain from the complainant one sulky of the value of $30, by falsely stating and representing to him that his own sulky was hard to ride in, and that he desired the complainant's sulky to go to Albany, and would return it the next week, but that on the contrary he shipped it from Albany to Fort Plain, with intent to cheat and defraud the complainant: *Held*, that this was colorable evidence, sufficient to call upon the justice to exercise his judgment, in determining the propriety of issuing process; and that, having acted in good faith, he should be protected: *Id.*

Effect of a General Verdict.—A general verdict, in a criminal case, is equivalent to a special verdict finding all the facts which are well pleaded in the indictment: *Fitzgerald* v. *The People*, 49 Barb.

Where, upon an indictment charging the prisoner with having committed the crime of murder in the first degree, the jury find a general verdict of guilty, the court is justified in pronouncing a judgment sentencing him to be hung: *Id.*

Indictment.—A common law indictment for murder is good and sufficient, in form, to charge the statutory definition of the crime; *i. e.*, the premeditated design to effect the death of the person killed, which the statute makes an indispensable ingredient of the crime, is comprehended in the averment of a wilful and felonious killing with malice aforethought: *Id.*

Debtor and Crediotr.

Fraudulent Sale—Liability of Purchaser with Knowledge.—A purchaser of a stock of goods from a debtor confessedly insolvent, where the purchaser knows that the debtor's purpose is to hinder and delay a par-

ticular creditor, and also that if the debtor intended a fraud on his creditors generally, the purchase would necessarily be giving him facilities in that direction, is not responsible in equity (the sale being an open one, for a fair price, and followed by change of possession), for any part of the consideration-money which the debtor had applied to payment of his debts; but is responsible for any part which he has diverted from such payment: *Clements* v. *Moore*, 6 Wall.

Statements either oral or written made by the vendor after such a sale are incompetent evidence against the purchaser on a suit by the particular creditor to set the sale aside: *Id.*

Charges of Factor.—The proper charges and expenses of converting a security into money are first to be deducted from the gross proceeds; and it is the balance only, which is applicable to the discharge of the debt: *Sheldon* v. *Raveret*, 49 Barb.

This is especially so, when the creditor is also the factor of the goods; he having a lien for all those charges, which cannot be diverted without his consent. The factor is accountable only for the balance, after deducting his charges and expenses: *Id.*

Deed.

What passes by.—M. and W. were the owners of adjoining farms; that of M. lying between the farm of W. and the public highway. M. conveyed to W. a strip of land twenty-four feet wide, and extending from the land of W. to the highway, "*for a private road.*" And the grantee covenanted that the grantor, his heirs and assigns, might "have free and full permit to travel the said road." The deed contained the usual covenant of warranty. *Held*, that the deed conveyed the strip of land in fee; the covenant on the part of the grantee, securing to the grantor the right to travel upon the said road, being consistent with the assumption that the grantee was to, and did, become the owner of the land, reserving to the grantor merely the right to travel thereon: *Kilmer* v. *Wilson*, 49 Barb.

Equity.

Practice and Pleading.—A complainant in chancery cannot by waiving a verification on oath to the defendant's answer, deprive such answer, when made without such verification, of its ordinary effect: *Clements* v. *Moore*, 6 Wall.

In chancery when an answer which is put in issue admits a fact, and insists on a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved, otherwise the admission stands as if the fact set up in avoidance had not been averred: *Id.*

In this case, three answers in chancery denying allegations made in a bill, of fraud on creditors by an admitted conveyance of real property on the part of an insolvent debtor to his wife through a third person, *held* not to disprove the allegations; the answers being discrepant in striking particulars from each other, and, as respected the consideration, with the deeds themselves; no proof being given of the mode of payment by the third person (who, it was set up, had purchased the property from the husband, for himself, and afterwards sold it to the wife on payment from her separate property), nor any proof beyond the answers of her husband

and herself and a previous statement of the husband, then arranging the transaction, that the wife ever had any separate property: *Id.*

EVIDENCE. See *Debtor and Creditor.*

FALSE REPRESENTATIONS.

As to Another's Solvency.—Though an individual is not obliged to answer inquiries in respect to the solvency of a third person, yet, having undertaken to do so, he is bound to speak truthfully, and is not at liberty to suppress a fact within his own knowledge, bearing materially upon the pecuniary responsibility of such third person: *Viele* v. *Goss*, 49 Barb.

Where the defendant, on being inquired of, by the plaintiffs, in regard to the solvency of another, omitted to state in his reply, the fact that the latter was largely indebted to him at the time, and alluded to his indebtedness in such a manner as would naturally have the effect to quiet any apprehension on that subject, and produce the impression that it was quite inconsiderable; and within a few months, the indebtedness of such third person to him ripened into a judgment which absorbed the entire property of the debtor; it being shown that had the extent of such debtor's liability to the defendant been stated, credit would have been refused to him by the plaintiffs. *Held*, that the defendant was liable to the plaintiffs for the value of goods sold to such third person, on the strength of the defendant's representations: *Id.*

PRACTICE.

Setting aside Verdict.—Where the real question involved in an action has not been presented, or determined, the verdict will be set aside: *Burwell* v. *Greathead*, 49 Barb.

PROMISSORY NOTES.

Defence to.—In an action upon a promissory note, brought by a person who is not a *bonâ fide* holder thereof, he having assumed no liability nor parted with anything as a consideration for the delivery of the note to him, any defence which could have been interposed by the defendant to the note in the hands of the payee, is available to such defendant: *Van Valkenburgh* v. *Stupplebeen*, 49 Barb.

RAILROAD COMPANIES.

Compensation to Property Owners.—A. being the owner of a nail factory, together with the easement or right to carry the waters of a creek across a certain parcel of land thereto, the defendant, for the purpose of constructing its railroad, acquired by purchase a portion of the land subject to such easement. The road being constructed in such a manner, and upon such a grade, that the water could no longer be conveyed to the factory across the land in a straight trunk, the defendant took down the original raceway, and carried the water under the railroad track, in a new trunk built for that purpose. A. accepted the new structure without objection, and used the water flowing through it during his life. *Held*, that such acceptance of the substituted structure was in judgment of law a compensation for all damages sustained by A.

in consequence of the removal of the original raceway: *Arnold et al.* v. *The Hudson River Railroad Company*, 49 Barb.

The legislature may rightfully authorize the construction of railroads or other works of a public nature, without requiring compensation to be made to persons whose property has not actually been taken, or appropriated for the use thereof, but who may nevertheless suffer indirect or consequential damages by the construction of such works: *Id.*

The case of a railroad company acquiring its roadway subject to an easement or servitude appurtenant to mill property, consisting of the right to carry water across the land of another to the mill, is within the above principle: *Id.*

If the owners suffer an injury by having the easement impaired, this is an injury which the property suffers in consequence of the construction of a public work, under legal authority, and not the *taking* of the property: *Id.*

Such a loss is to be regarded as *damnum absque injuria*, except in cases where, by statute, compensation is required to be made: *Id.*

Receiver,

Effect of Executing a Bond to.—The execution of a bond by the defendant, to the plaintiff *as receiver*, is to be deemed an admission by the obligor, not only that the plaintiff has been duly appointed receiver, but also that the receiver is authorized to bring the action mentioned in the condition of the bond: *Scott* v. *Duncombe*, 49 Barb.

When in an action upon such a bond, the defendant does not allege in his answer that the plaintiff has not been regularly appointed receiver, it is not necessary for the plaintiff to introduce even the original order appointing him receiver, or his bond as receiver: *Id.*

Action upon Bond to.—The surety in a bond given to a plaintiff suing as receiver, conditioned to pay any sum the plaintiff may recover against the principal obligor, in that action, is liable for the amount of judgments recovered in cases where the obligee is appointed receiver subsequent to the execution of such bond, as well as for the amount of those recovered previously: *Id.*

Stock.

Pledge of.—A purchase of stocks, by brokers, as agents for another, with an advance of money by the former on account of the latter, upon condition that the principal shall deposit a margin of ten per cent., and deposit a further margin when required by the agents, is not to be considered a pledge of stocks for the payment of a sum of money advanced thereon, and requiring a notice of the time and place of selling the pledge to make the sale legal: *Hanks* v. *Drake et al.*, 49 Barb.

Right of Agents to Sell.—Under such an agreement, the agents have a right, upon the principal's failing to deposit a further margin when required so to do, to sell the stock and close the transaction: *Id.*

But before the owner of the stock can be called upon, under such a contract, to deposit any additional margin, the agents should give him notice that his margin is diminished, and that they require a further margin. And a reasonable time to comply should be allowed, before the stock can be sold: *Id.*

Where agents, within two hours after giving notice to their principal that a further margin was required, no time being specified for compliance, sold the stock and rendered an account of sales. *Held*, that the court could not hold, without further evidence, that reasonable time for performance had been given. That to decide that point, as matter of law, the facts should appear, by which the court could say the party was able within the time given, to do the act required, and therefore that the time was reasonable: *Id.*

Ratification of Sale by Agents.—Where the owner of stocks received information of a sale thereof by his agents, in May, and remained silent until September, when he demanded an account of sales, which was sent to him, with a check for the balance due him, which he indorsed and collected, *Held*, that this amounted to a full *ratification* of the sale; and that it was too late for him afterwards, to seek to set it aside: *Id.*

NOTICES OF NEW BOOKS.

THE CONSTITUTIONAL CONVENTION; its History, Powers, and Modes of Proceeding. By JOHN ALEXANDER JAMESON, Judge of the Superior Court of Chicago, and Professor of Constitutional Law, &c., in the Law Department of Chicago University. 8vo., pp. 561. New York: Chas. Scribner & Co. 1867.

We have had the above-named work upon our table for several months past, and have been unwilling to speak of it until we could find an opportunity, not easily obtained in the pressure of various duties, to read it carefully and completely through.

In no other country could such a book have been produced, and certainly at no other time even here could it have been produced so opportunely. Constitutional conventions are a peculiar feature of the political institutions of the United States, and at present, of all times in our history, their "powers and modes of proceeding" are of the most vital interest. The principles of popular government occupy the conversation of nearly all men in this country, and from the foundation of the government there have never been wanting men of master minds who have given to political science a profound study. But the conflict of interests and the discussion of principles has generally been upon the construction of written constitutions and the practical powers of the government or its officers under them. Judge JAMESON however has gone deeper, and in the present work has examined the legal powers of the people themselves in the formation of their governments and the principles by which they are properly guided in the establishment or change of constitutions under the forms of law. In one sense this may be called an inquiry into the precise limits of the ultimate right of revolution and the proper or justifiable occasions for its exercise. In the course of this inquiry many topics of the most vital and permanent political interest from the foundation of the American governments down to the changes of fundamental law now in process, come under discussion, and perhaps there is no better